

The priority policy of the Belgian Competition Authority for 2016

1. Introduction

An efficient functioning of the markets leads to sustainable and inclusive growth for the benefit of businesses and consumers. The discipline imposed by forming a competitive environment is an important added value for companies, but also for consumers. The Belgian Competition Authority (hereafter the “BCA”) thus makes an active contribution to initiatives that protect the functioning of competitive markets with a view to improve the welfare of consumers and support growth, employment and the competitiveness of the economy.

The objective here is to detect potential problems that may arise within a given market and to offer a solution taking into consideration the structure of that market. Besides indirect acting through its contribution in international advisory committees and working groups, the BCA has three types of instruments to promote the functioning of the markets:

- i) The formal procedures aimed at the prosecution of infringements of the Belgian and / or European competition law;
- ii) Control of concentrations;
- iii) The informal competition policy, which includes a broad range of interventional capabilities.

The informal competition policy involves, on the one hand, the interpretation of the competition rules and explaining the actions of the BCA on the basis of answers to questions put by stakeholders or questions asked to the contact persons listed on the website of the authority. In practice, the interpretation of competition rules are disseminated through various channels, including the publication of guidelines, informal advice, assistance to jurisdiction (*amicus curiae*), participation in conferences and contributions to publications on competition law. The informal competition policy of the BCA comprises on the other hand, a screening of the competition legislation in which the authority is involved when drafting the regulations¹ to ensure that this does not reduce the level of competition on the market.

Since the BCA does not have any discretionary jurisdiction regarding the selection of cases on the control of concentrations, this note about the priorities of the BCA discusses mainly the first of these three policy instruments. The application of competition rules relating to restrictive practices with the possible imposition of penalties is indeed the core business of the BCA, and largely determines the impact of the actions undertaken by the BCA on the functioning of the market. This application of the law allows to respond immediately to the behaviour of the market players, for example by imposing fines to penalize

¹ Measures to promote competition do not necessarily belong exclusively to Book IV of the Code of Economic Law, nor to the competition authority itself: other institutions could also take measures to improve the functioning of certain markets.

and to discourage infringements, but also by imposing correctional measures, such as interim measures or by making mandatory commitments proposed by the companies. This impact is not limited to the direct effect of the procedure on the market in question, but extends to the expected impact on the behaviour of other companies and the ability to support economic growth.

The present note was drafted by the Board of the BCA in accordance with Article IV.25 of the Code of Economic Law.

It is divided as follows:

- Section 2 explains how the BCA makes the selection of the formal investigations they perform;
- Section 3 describes the strategic and sectorial priorities for competition policy the BCA will pursue in 2016.

2. The determination of the priorities

The formal procedures aimed at the prosecution of infringements are the hard-core of the instruments of which the BCA has to act as a deterrent. With a view to make optimum use of its resources, it will focus its interventions on those cases where the expected positive impact of its actions is the greatest, taking into account the resources needed to carry out the actions successfully. They must find the right balance here:

- between relatively simple cases aiming at deterring the most obvious infringements, and the more complex or innovative cases with added value for the case law;
- between the cartel agreements, the vertical restraints and the abuses of dominant position;
- between cases that can be completed within a relatively short period of time and cases that need a longer investigation term;
- between different economic sectors in order to ensure a balance between strategic sectors with a macro-economic interest and other sectors.

As is the case with other competition authorities, the BCA takes into account four factors to assess the importance of the case²:

- **Impact** -The authority will evaluate the direct damage caused by denounced conduct in the relevant sector, not only in terms of the price charged, but also on the impact on the quality of the product or service to consumers. It will also take into account various indirect effects, such as the deterrent effect on other infringements in related sectors, and the effect on the value chain when the denounced conduct has an impact on its operation.
- **Strategic importance** -To start up an investigation regarding an alleged infringement can be of strategic importance for the BCA when the sector where the infringement occurred is considered as a priority (see below), or if it wants to clarify an interpretation of the law and the case can be a

² See in particular, "OFT Prioritisation Principles" http://www.ofc.gov.uk/shared_ofc/about_ofc/ofc953.pdf

precedent. However, when the Authority determines that other institutions are better placed to deal with the specific problem, then it will be less strategic.

- **Risks** -The BCA will be less inclined to deploy resources for the investigation of an infringement if the risk is real that the investigation will yield no useful result.
- **Means** -The BCA will also take into account the resources needed to launch an investigation or to continue an investigation, and this will be decisive to determine the calendar of investigations.

3. Strategic priorities and preferential sectors for 2016

Notwithstanding the BCA obviously will continue to sue serious infringements of competition law in all sectors of the economy, the authority intends to take actions within the wide range of the following sectors:

- The liberalized sectors and network industries³;
In particular, the postal and telecommunications services markets will be a priority for the BCA. Regarding the sector of retail telecommunications services, Belgian consumers increasingly choose triple or quadruple play offers, on which margins are larger and consumers more loyal. Competitive dynamics therefore require that telephone operators that do not yet offer triple or quadruple play options and wish to do so, have the possibility to offer such contracts. The Competition Authority will ensure that entry barriers are not erected by competitors or suppliers.
- The sector of wholesale distribution and relationships with its suppliers (e.g. the agri-food industry)⁴;
Both the settlement decision of the Investigation & Prosecution Service on coordinated price increases of drugstore, perfumery and hygiene products, as well as the Ahold/Delhaize merger indicate that this important sector for the economy and consumers requires our full attention.
- The sector of media and digital economy;
The BCA will continue to draw its attention to the maintenance of effective competition within the sector of the media and the digital economy, in particular as regards consumer access to content, regardless of platform. In addition, the BCA will ensure that innovative business models are not threatened by anticompetitive conduct, and will use its advisory powers to draw attention to any regulations which prevent the emergence or further growth of new entrants.
- Services to companies (and consumers);
In line with the warning of the National Bank on the development of prices in the services sector⁵, and taking into account the fact that the competitive relationship between the operators vary

³ The horizontal screen of the FPS Economy identifies a number of sectors which deserve special attention, including electricity, gas, steam and air conditioning supply (NACE 35), and telecommunications (NACE 61).

⁴ The horizontal screen of the FPS Economy identifies a number of sectors which deserve special attention, including manufacture of sugar (NACE 1081) and manufacture of cider and other fruit wines (NACE 1103).

⁵ Report 2015 of the National Bank of Belgium, § 47 “there are signs that high inflation is persisting, especially in services, perhaps because of insufficient productivity gains, the practice of price indexation, or increased margins. Price rises of that type accelerate

sensitively according to the market concerned, the BCA will continue to work for a more efficient functioning of a number of markets for professional services. Therefore, the BCA will continue to take action on two fronts, namely the enforcement of the competition law to professional associations if they violate the rules, and on the other hand advocate to get rid of the restrictions related to the legal form which a company can take to offer its services.

- The sector of public procurement

The contracting authorities provide annual contracts for an amount of about 50 billion euros, this represents approximately 10 to 15 % of the national product⁶. Furthermore, these contracts are extremely sensitive to the formation of cartels as in public procurement, unlike other markets, the price evolution has no impact on the contracted volumes (determined by the contracting authorities)⁷.

This list of priority sectors will be reviewed in consultation with the Price Observatory based on its screening methodology.

Regarding the type of infringement which will be prosecuted by the BCA, it will pursue a balance between the prosecution of clear infringements (hard-core infringements) and more complex and / or more innovative cases. Taking into account its limited human resources, the BCA will this year focus its attention primarily on cartels, since they have a significant adverse effect on the market: besides the direct impact of the price increase, such agreements reduce incentives for product innovation, and incentives to compare prices in the case of consumers.

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the loss of purchasing power caused by the index jump, as well as bringing forward the time when indexation can resume, and therefore reduce its effectiveness. If these price rises persist, they will also exert more permanent pressure on competitiveness, not only because the services provided are intermediate inputs for branches exposed to competition, but also because the movement in their prices affects wage-setting.” and §54 “More competitive product markets – the need for which is still evident particularly in the network industries and in certain services sectors – will permit efficiency gains and price reductions which will benefit purchasing power and cost competitiveness.”

⁶ An OECD study estimates public procurement at an amount of about 15 % of the national product : OECD (2007), “Bribery in procurement, Methods, actors and counter-measures”.

⁷ See for example Heimler, A. (2012) « Cartels in Public Procurement », Journal of Competition Law & Economics.